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No. 84-258

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROY L. SCHAPANSKY, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that their removal from positions as air traffic controllers was procedurally improper.

1. The underlying facts are set forth in our Brief in Opposition in *Campbell* v. *Department of Transportation,* No. 84-78, another petition arising out of the air traffic controllers' strike.[1] Petitioners were among the more than 11,000 air traffic controllers who participated in a nationwide strike against the United States in 1981. As a result, they were removed from their positions by the Federal Aviation Administration. Following their removal, petitioners appealed to the Merit Systems Protection Board,

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[1]A copy of our response in *Campbell* has been sent to counsel for petitioners. One other petition arising out of the air traffic controllers' strike is currently pending. *Anderson* v. *Department of Transportation,* No. 84-259.

where they were afforded hearings. The presiding officials sustained their removal and the full Board affirmed. Petitioners then sought review in the United States Court of Appeals for the Federal Circuit. Theirs were among nine appeals treated as "lead cases" by the court of appeals, while more than 3,000 other appeals were stayed pending the decisions in the lead cases. On May 18, 1984, a five-judge panel of the court of appeals issued eleven decisions in the nine lead cases, affirming the removal of petitioners and, with one exception, each of the other air traffic controllers whose claims were presented. See 84-78 Br. in Opp. 2-4.

2. All of the questions presented in this petition were also presented in the petition in *Campbell*. The decision of the court of appeals in *Campbell* (84-78 Pet. App. 1-14; 735 F.2d 497), moreover, was issued on the same day as and relied extensively on the very decisions that petitioners now ask this Court to review. The Court denied certiorari in *Campbell* on October 9, 1984, and petitioners have not presented any basis on which to distinguish their claims or any independent reason justifying review. Accordingly, the petition should be denied.

Petitioners contend that they were improperly allowed less than seven days to respond to the notices of proposed removal (Pet. 8-13, 22-23), that there is a conflict with respect to whether removal is the mandatory penalty for engaging in a strike against the United States and that the court of appeals failed to consider mitigating factors in affirming the penalty (Pet. 13-19, 23-29), and that the court erred in its allocation of the burden of proof with respect to their participation in the strike (Pet. 19-21).[2] Our response

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[2]Petitioners also suggest (Pet. 6 & n.3) that the court of appeals believes that the case is worthy of this Court's consideration and that the petition is likely to be granted. This suggestion is baseless. The court of

in *Campbell* addresses each of these arguments (84-78 Br. in Opp. 9, 10-12, 5-8).[3]

For the foregoing reasons and those expressed in our response in *Campbell* v. *Department of Transportation*, No. 84-78, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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appeals stayed proceedings pending final disposition of the lead cases as a matter of orderly case management; its "Notice to Counsel and Petitioners in Air Traffic Controller Litigation" nowhere evinces the position petitioners would ascribe to the court.

[3]Petitioners' contention (Pet. 23-29) that the Board and the court of appeals improperly failed to consider mitigating factors is meritless. To the contrary, both the Board (Pet. App. 73a-74a) and the court (*id.* at 12a-14a) addressed the question of mitigation, and concluded that the offense committed by petitioners — engaging in an illegal strike designed to cripple the nation's air transportation system — was so serious that the mitigating factors raised by petitioners could not justify reducing the penalty. This analysis is fully in accord with the precedents of both tribunals. See *Douglas* v. *Veterans Administration*, 5 M.S.P.B. 313 (1981); *Nagel* v. *Department of Health & Human Services*, 707 F.2d 1384 (Fed. Cir. 1983). Finally, petitioners' argument (Pet. 15, 18-19, 26-29) that all striking air traffic controllers must receive the same penalty is erroneous: an unevenly applied sanction is not for that reason alone invalid (*Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 188 (1973)) and in any event, as the court of appeals noted (Pet. App. 14a), all similarly situated controllers did in fact receive the same penalty.

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